

The Framework for Promoting Public Protection Through Regulation

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Last major revision May 2001

Regulation of health professions and occupations is an integral part of life in the world today. At the core of regulation is the protection of the public. Any effective method of protecting the public should address all practitioners in a given field, and must be a permanent and ongoing mechanism. Whenever a service or activity can be shown to demonstrate a potential risk to the public, the government, or in some instances other organizations, are likely to intervene by establishing criteria that must be met before the service or activity can be provided, standards for the safe provision of the service and sanctions for failure to provide the service or activity in a safe manner. Persons or entities that meet the initial and ongoing criteria established through regulation are issued a credential. This credential then serves as the practitioners' or entities' proof that they have met those criteria. This "proof" is conveyed to the public through a variety of means including, but not limited to, the use of titles, initials after one's name, letterhead stationery, name badges, signs in facilities and on vehicles and open display of the credentialing document. The process used to authorize a profession or occupation to engage in certain practices based on the established criteria is referred to as the credentialing process.

Given that the purpose of regulation by the state is the protection of the public, it follows that only those professions and occupations that meet the established criteria for regulation should be credentialed. If it is in the interest of public protection to credential an individual, then only persons possessing the credential should be allowed to provide the service and the state should maintain authority for removal or limitation of that credential. This description of regulation is consistent with the definition of licensure. The NCR 2000 Implementation Team recommends that the only credential issued by the state to persons in health professions or occupations should be a *license*.

Credentialing System Described

Persons who work in health professions and occupations are credentialed by the State for the purpose of protecting the public from preventable harm or danger. In Nebraska the Department of Health and Human Services Regulation and Licensure Credentialing Division should be responsible for the credentialing of health professions and occupations. Individuals should be credentialed at the level necessary to protect the public. Three levels of credentialing are currently recognized in Nebraska – licensure, certification and registration. However, the use and application of these terms is not uniform and consistent throughout the department. The Nebraska Credentialing Reform 2000 study was initiated to conduct a comprehensive evaluation and redesign of the credentialing criteria and processes.

The system used for credentialing persons in health professions and occupations strives to achieve a balance between assuring the qualifications and competence of the credentialed individual, and assuring that the public has access to needed and desired services and

information. The system should strive not to unnecessarily impede the mobility of credentialed persons or set up artificial barriers to entry into the practice of a health profession or occupation. The system should also incorporate an awareness of the effectiveness of its activities and decisions and applies that information to the ongoing improvement of the system.

To evaluate a profession or occupation to determine the appropriate level of regulation, standard criteria are to be used. The same criteria are to be applied in each of the following circumstances: (1) When professions or occupations are seeking to become credentialed for the first time, (2) When currently credentialed professions or occupations are undergoing a review to determine if credentialing continues to be appropriate for public protection, (3) When currently credentialed professions or occupations are seeking a change in their scope of practice and (4) When there are significant changes in a profession or occupation standards for entry, continuing or removal from practice. These criteria build on each other to create an evaluation of the characteristics of the profession or occupation being considered for regulation.

Prior to applying these criteria to a profession or occupation it should first be determined that the profession or occupation meets the following prerequisites: (1) The profession or occupation has unique skills, knowledge or abilities that are teachable and testable and distinguish it from routine work and labor, and (2) The profession or occupation engages in practices that have a potential impact on the public's health and the scope of these practices can be articulated and described. Scope of practice describes not only the statutorily determined range of activities, actions, procedures or tasks that are considered standard practice, but also those activities within the acceptable legal realm for that profession or occupation based on historical practice perspectives and the education or training required for the profession or occupation. An occupation must have skills that are teachable and testable. If it is determined that the profession or occupation meets these prerequisites, then an evaluation shall be conducted based on the following criteria:

- The risk the practice of the profession or occupation poses to the public.
- The potential the public has for self-protection against any harm the practice of the profession or occupation may pose.
- The amount of independent judgment the practitioners of the profession or occupation may exercise.

CRITERION 1: THE RISK THAT THE PRACTICE POSES TO THE PUBLIC

The first criterion is the evaluation of risk associated with the practice of the profession or occupation. Risk is defined as the possibility of suffering harm or loss and is synonymous with danger. Both individuals and populations may be placed at risk by the practice of a profession or occupation. Risk is not dependent on direct contact between the practitioner and the consumer of the services. Indirect contact between the practitioner and the consumer of the services, as in the case of workers who deal with environmental contaminants, may also pose a risk for individuals and/or populations. For

the purpose of determining the appropriate level of regulation, three levels of risk have been identified:

High Risk – A profession or occupation is determined to be high risk if the practice of the profession or occupation has the potential to result in the death or permanent physical or psychological injury or disability of the consumer(s) of the services. If the potential harm is reversible, but the intervention required to reverse the harm is beyond the scope of practice for the practitioner causing the harm, the overall potential risk of the practice is increased. Practices that involve invasive procedures generally pose a high risk.

Moderate Risk – A profession or occupation is determined to be moderate risk if the practice of the profession or occupation has the potential to result in pecuniary damage or temporary physical or psychological injury to the consumer(s) of the services. If the potential harm is reversible, and the intervention required to reverse the harm is within the scope of practice for the practitioner causing the harm, the overall potential risk of the practice is mitigated.

Low Risk – A profession or occupation is determined to be low risk if the practice of the profession or occupation has minimal potential to result in harm or injury to the consumer(s) of the service or if the potential perceived harm is self reversible or easily reversible.

The Evaluation of Risk

The evaluation of risk is the first and most critical element in determining if, in the interest of public protection, a profession or occupation should be regulated and credentialed by the state. The evaluation of risk involves examining the profession or occupation by answering a series of questions designed to determine the likelihood that the public can be harmed or suffer loss as a result of the practice of the profession or occupation and that the potential harm is attributable to the absence of regulation. Harm is a negative event that is easily recognizable and not remote or dependent upon tenuous argument. A certain level of harm, attributable to human error and uncontrollable factors, will always occur within any health-related field. If it is determined that a possibility for harm or loss exists, the likelihood and extent of such harm or loss must also be determined. In applying the following model to determine risk, the term “scope of practice” is used in conjunction with both professions and occupations. Scope of practice describes not only the statutorily determined range of activities, actions, procedures or tasks that are considered standard practice, but also those activities within the acceptable legal realm for that profession or occupation based on historical practice perspectives and the education or training required for the profession or occupation. The term invasive procedure is used to describe procedures that involve the insertion of digits or instruments into body orifices or the piercing or incision of the integumentary system. Procedures that intrude or infringe on human emotion or psyche resulting in humiliation or mental suffering are also considered invasive procedures.

Level I:

If the level of *risk* is determined to be *high*, no further evaluation is required and the profession or occupation should be regulated at ***Level I***.

Further Evaluation:

If the level of *risk* for the profession or occupation is determined to be *moderate or low*, ***go to evaluation of the potential for self-protection by consumers of the services of the profession or occupation should be conducted*** before the appropriate level of regulation can be determined.

CRITERION 2: THE POTENTIAL FOR SELF-PROTECTION BY THE CONSUMERS OF THE SERVICES OF THE OCCUPATION OR PROFESSION

The second criterion is the evaluation of the potential for self-protection on the part of the consumers of the services of the profession or occupation. The intent of this evaluation is not to judge the consumer, but rather to evaluate the impact of the characteristics of the consumers on the practice of the profession or occupation. Potential for self-protection is defined as the extent to which the consumer is able to recognize when he/she is susceptible to harm and/or is liable to succumb to persuasion or temptation. Factors that influence potential for self-protection as it pertains to a profession or occupation include the ability of the consumer to: (1) fully comprehend the terminology and procedures of a profession or occupation in order to make informed decisions regarding receipt of services, (2) evaluate the effectiveness of treatment or services, (3) know when to seek additional or alternative services, and (4) sense the need for or the effects of services. Examples: A consumer may have a low potential for self-protection if he/she is unable to understand, question, discuss options and make decisions related to the services provided by an occupation or profession are beyond the individual's capability. Services provided by some occupations or professions are intended to serve a consumer population with an inherent low potential for self-protection, i.e., children or adults with cognitive impairment. In these instances there needs to be a consideration of whether there are others who play a role in self-protection for the individual and whether or not such caretakers are present or absent. It should also be determined if another government agency has been charged with monitoring this particular population. A consumer may have a low potential for self-protection if they are unaware of the possible impact that the practice of the profession or occupation may have on the consumer's immediate environment. This unawareness may be due to the consumer's inability to detect the impact through the senses: the impact cannot be seen, felt, heard, smelled or tasted, e.g. the presence of radon. The concept of potential for self-protection can be applied to individuals and populations. For the purpose of determining the appropriate level of regulation, three levels for self-protection have been identified:

Low Potential for Self-Protection – The consumers of the services of a profession or occupation are determined to have low potential for self-protection if the language and procedures of the profession or occupation are based on knowledge and scientific

principles that are not familiar to the average consumer. The consumer cannot fully understand and assess the effectiveness of the treatment through non-scientific measures. This understanding may be further impeded by disease or disability. Practices of the profession or occupation that impact the individual's consciousness or ability to self-protect, i.e., anesthesia and hypnosis, may render the consumer temporarily helpless to act regardless of their ordinary potential for self-protection.

Moderate Potential for Self-Protection – The consumers of the services of a profession or occupation are determined to have moderate potential for self-protection if one or more the following are true: (1) The consumer of the services has a basic understanding of the terminology and procedures of the profession or occupation, but may not fully understand the principles that underlie the procedures, (2) the consumer is aware that there are risks associated with the practice of the profession or occupation, but does not fully understand the potential individual ramifications of those risks, and/or (3) the consumer understands the risks associated with the practice of the profession or occupation, but due to physical, emotional or environmental restrictions, is unable to exercise alternatives.

High Potential for Self-Protection – The consumer of the services of a profession or occupation is determined to have high potential for self-protection if one or more of the following are true: (1) The terminology and procedures of the profession or occupation are firmly and easily understood by the consumer and can be freely discussed with the practitioner, (2) the consumer is fully aware of any risks associated with the practice of the profession or occupation and has complete ability to terminate treatment or services and seek alternatives.

Level I:

If the degree of *risk* associated with the profession or occupation was found to be at the *moderate* level and the *potential for self-protection* by the consumers of the services of the profession or occupation is *low*, no further evaluation is required and the profession or occupation should be regulated at ***Level I***.

Level II:

If the degree of *risk* associated with the profession or occupation was found to be at the *moderate* level, but the *potential for self-protection* by the consumers of the services of the profession or occupation is found to be *high*, no further evaluation is required and the profession or occupation should be regulated at ***Level II***. If the degree of *risk* associated with the profession or occupation was found to be at the *low* level, but the *potential for self-protection* by the consumers of the services of the profession or occupation is also found to be low, no further evaluation is required and the profession or occupation should be regulated at ***Level II***.

No Credential:

If the level of *risk* is determined to be *low*, but the *potential for self-protection* by the consumers of the services of the profession or occupation is *high*, no further evaluation is required and the profession or occupation should be regulated at ***No Credential***.

Further Evaluation:

If the level of *risk* for the profession or occupation is determined to be *moderate or low*, and the *potential for self protection* by the consumers of the services of the profession or occupation is found to be *moderate*, ***go to evaluation of the degree of independent judgment by members of the profession or occupation should be conducted*** before the appropriate level of regulation can be determined.

CRITERION 3: DEGREE OF INDEPENDENT JUDGMENT ASSOCIATED WITH THE PROFESSION OR OCCUPATION

The third criterion is the evaluation of the degree of independent judgment associated with the profession or occupation. The degree of independent judgment associated with a profession or occupation is a measure of the extent to which the practitioner can legally make decisions related to the modality of therapy or type of service that will be provided. Some professions or occupations with a limited scope of practice may have independent judgment within their scope of practice while other professions or occupations may be required to work under direction of another practitioner and have a lesser degree of independent judgment. For example, diagnosis requires more independent judgment than providing treatment and providing treatment requires more independent judgment than providing services such as a bed bath or transferring from bed to chair. Generally speaking, the higher the educational level required for practice of a profession or occupation, the greater the independent judgment allowed for the profession or occupation. For the purpose of determining the appropriate level of regulation, three levels for independent judgment have been identified:

High Degree of Independent Judgment

A profession or occupation is determined to have a high degree of independent judgment if the scope of practice is very broad and there are no requirements to work under direction or supervision of another profession or occupation. The profession or occupation must take raw facts or material and formulate a plan of action to achieve a successful outcome without clearly defined criteria in the scope of practice. There may also be a responsibility for coordinating several independent plans of action to avoid conflicting results.

Moderate Degree of Independent Judgment

A profession or occupation is determined to have a moderate or medium degree of independent judgment if the scope of practice is somewhat limited or limited in some areas. A requirement to function under protocols may also limit independent judgment. The profession or occupation must take facts or material and formulate a plan or action to achieve a successful outcome with some clearly defined criteria in the scope of practice.

Low Degree of Independent Judgment

A profession or occupation is determined to have a low degree of independent judgment if the scope of the profession is significantly limited. The practitioner is required to work under the supervision/direction of another practitioner and/or must follow a plan of action to achieve a successful outcome with very clearly defined criteria in the scope of practice.

Evaluation of Degree of Independent Judgment

The evaluation of degree of independent judgment is the final element in determining if, in the interest of public protection, a profession or occupation should be regulated by the state. The evaluation of degree of independent judgment involves evaluating the extent to which the practitioner can legally make decisions related to the modality of therapy or type of service that will be provided by answering a series of questions designed to determine if the practitioner has a full range of options available for selection or if the nature of the practice or occupation or the practitioner's scope of practice limits his/her options.

Level II:

If the *risk* associated with the profession or occupation was found to be *moderate*, the *potential for self-protection* was found to be *moderate*, and the *degree of independent judgment* was found to be *high or moderate*, the profession or occupation should be regulated at **Level II**.

If the *risk* associated with the profession or occupation was found to be *low*, the *potential for self-protection* by consumers of the services of the profession or occupation is found to be *moderate*, and the *independent judgment* is found to be *high*, the profession or occupation should be regulated at **Level II**.

Level III:

If the *risk* associated with the profession or occupation was found to be *moderate*, and the *potential for self-protection* by the consumers of the services of the profession or occupation was found to be *moderate* and the *degree of independent judgment* is found to be *low*, the profession or occupation should be regulated at **Level III**.

If the *risk* associated with the profession or occupation was found to be *low*, the *potential for self-protection* by consumers of the services of the profession or occupation is found to be *moderate* and the *degree of independent judgment* is found to be *moderate or low*, the profession of occupation should be regulated at **Level III**.

Chart for “The Framework for Promoting Public Protection Through Regulation”

